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Supreme Court of the United States

OCTOBER, 1954 TERM

No. 693

SOPHIE D. COHEN and MEYER KRAUSHAAR, Executors of the Estate of William W. Cohen, Deceased,

Petitioners,

against

BESSIE G. GLASS, Executrix of the Estate of Joseph Glass, Deceased, JOSEPH P. TUMULTY, JR., Executor of the Estate of Joseph P. Tumulty, Deceased, and MIDDLE STATES PETROLEUM CORPORATION,

Respondents.

PETITIONERS' REPLY TO BRIEFS OF RESPONDENTS

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Dated: May 1, 1955.

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Reply to Joint Brief of Respondents Glass and Tumulty

1.

Concerning the question of so-called jurisdiction as to Glass, respondents for the first time here urge that the Court of Appeals had no jurisdiction of the appeal in respect to paragraphs 1, 2, 3, 6 and 7 of the judgment of March 25, 1954, as amended by the judgment of January 11, 1955, arguing that the appeal from the first judgment was dismissed and the appeal was not revived by the subsequent notice of appeal from the amended judgment.

On the first appeal the Court of Appeals ruled that the judgment was not final as to Glass and hence not appealable because it was lacking in finality (203 F. 2d 836, App. to Pet. pp. 2134-2137). It did not dismiss the appeal from the first judgment, but suggested either an adjournment of the appeal until the District Court completed its hearings on all matters reserved and if an appeal then be taken it could be consolidated with the first appeal, or in the alternative, for the appellants to stipulate that the decree should be considered modified so as to add to paragraph 4 the name of Joseph Glass as receiver and to delete paragraphs 5 and 9. The latter course was taken, but in 210 F. 2d 360 (App. to Pet. pp. 2138, 2146) the court dismissed the appeal as to Glass but held the stipulation insufficient without compliance with F. R. C. P. 23(a)(3), stating:

> "The parties may go before Judge Smith, if they so desire, and ask him to amend the judgment in accordance with their stipulation. If he approves, giving such notice to other members of the class as he thinks necessary, an appeal may be taken from the amended judgment, and the record will consist of the present record remaining on file in the court together with whatever further proceedings have taken place before Judge Smith. It would seem that the briefs now on file, supplemented if necessary by short additional briefs, would serve for the new appeal, and possibly the case could be decided without further argument if the parties so wish. Such details can be determined later."

The parties did go before Judge Smith. The judgment was amended and the petitioners appealed from the amended judgment. No additional briefs were served and no further argument was had in the Court of Appeals, but both appeals were apparently consolidated and treated as one appeal.

The prevailing opinion upon which final judgment was entered recites at the outset that the appeal was taken from

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a judgment of the District Court "overruling objections to the application of Joseph Glass and Joseph P. Tumulty for a discharge as Receivers of United Oil Producers Corporation and granting them such a discharge and dismissing the complaint against MSP Corporation." The opinion of Judge Hand makes direct quotations from the language contained in the first judgment, and it is obvious that the second judgment incorporates within its terms paragraphs 1, 2, 3, 6 and 7 and was so understood by counsel, the District Court and the Court of Appeals.

The second notice of appeal follows the language of the second judgment, but it is clear from all the proceedings that had been taken that it was intended that the petitioners would ask for a review in the Court of Appeals of the determinations contained in paragraphs 1, 2, 3, 6 and 7 of the original judgment. It is clear that if the second notice of appeal were defective, the place to have raised that question would have been before the appeal raised by paragraphs 1, 2, 3, 6 and 7 was decided on the merits in the Court of Appeals and it cannot now for the first time be raised in this court. *United States* v. *Gomez*, 1 Wall. 690, 68 U. S. 690; *Smith* v. *Mason*, 14 Wall. 419, 81 U. S. 419; *Bigler* v. *Waller*, 12 Wall. 142, 79 U. S. 142; *Martin* v. *Clarke*, 105 F. 2d 685 (C. C. A. 7th, 1939); *Sobel* v. *Diatz*, 189 F. 2d 26 (C. C. A., D. C., 1951). As a matter of fact, any defects in the notice of appeal were waived by the respondents' appearance in the Court of Appeals and their argument upon the merits.

The time for service of a notice of appeal is of course always jurisdictional (Title 28 U. S. C. § 2107), but the notice itself can always be clarified by amendment, if need be, and present no jurisdictional problem. F.R.C.P. 73, Barron & Holtzoff, Vol. 3, § 1555.

Plainly the respondents were not misled as to the questions which were raised since the second appeal was heard upon the original briefs used on the first appeal and no new briefs were filed. Clearly, the parties and the court con-

sidered that the second judgment did not supersede the findings and conclusions and determinations of the first judgment, but in effect incorporated these findings and determinations in the second judgment.

Under Point I the representatives of the receivers-respondents cite *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, and *Dickinson* v. *Petroleum Conversion Corporation*, 338 U. S. 507. These cases are wholly inapplicable. In the *Dickinson* case a final judgment was entered dismissing the plaintiff's complaint on the merits in 1947. The judgment left undetermined claims between the plaintiff and intervenors. No appeal was taken from that judgment, but when the case was finally decided on the claims of the intervenors in 1948, plaintiff appealed from the judgment. The court held that the 1947 decree was final and an appeal should have been taken then. Here, we took the appeal from the first judgment, which was in part final and in part interlocutory. The decision on the merits was withheld until the judgment became final.

The case of *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, also is inapplicable. The Court of Appeals in that case entered a final judgment on July 5, 1951. No petition for certiorari was filed within 90 days and the court dismissed the writ as untimely, holding that the time to file the writ was not extended by a revision made by the Court of Appeals later in matters not of substance.

Here, the timeliness of the application is unchallenged. The respondents' position is clearly an afterthought and counsel's argument should not commend itself to this court.

2.

Under the heading "Concerning the Questions Presented by Petitioners" at page 3, and at page 17 under the heading "Summary of Argument" and under Point II, pages 18-19,

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respondents Glass and Tumulty say that petitioners conceded that the receiver Tumulty was not liable. This is unfounded. That claim was challenged in the printed brief before the District Court, where the following point was made at pages 468-9:

"Liability of Mr. Tumulty

Mr. Tumulty's participation in this case is distinguished by his apparent inactivity. During the early days of the receivership and during the lifetime of Judge Mayer, he apparently did sign some petitions and other papers. There is no evidence in the case indicating that after Judge Mayer's death Mr. Tumulty did anything more than attend meetings of the reorganization committee and assist in Washington in the handling of the tax claims, and receiving his final payment. After the reorganization Mr. Tumulty did nothing.

There is no evidence that Mr. Tumulty sought any information concerning the receivership and it is conceded that since 1941 he has been ill and wholly disabled from taking any interest whatever in the receivership affairs. At the trial he was represented by his son, who took no active interest, offered no proof, made no explanation.

What, then, is his liability here? Tumulty's liability must depend, therefore, not on acts of malfeasance but on acts of nonfeasance. The relationship of co-receivers is analogous to the situation of joint trustees. Samuels v. Drew, 7 F. (2d) 764, aff'd 7 F. (2d) 766. An executor or trustee is only responsible for his own acts and not that of his associates, but if he knows of, consents to or is negligent in failing to carry out his trust, he is liable. Re Horowitz' Will, 297 N. Y. 252 and cases therein cited at page 258.

The very purpose of appointing two co-receivers is to have greater security in joint management and if one receiver takes over complete operation and management and the other stands idly by and does nothing but merely accepts his compensation, then the very purpose is frustrated.

Mr. Tumulty was not paid receivership fees for the work which he did, but for the responsibility which he assumed and the record does not bear out any claim that he did very much. He was presumably a watch-dog of the treasury and he cannot escape liability merely by saying that he did not know what was going on. It was his duty to know and for this failure he must be held accountable. He was bound to keep himself informed as to what was going on and to frustrate any effort on the part of his co-receiver to utilize receivership funds for the benefit of MSP. Brown v. Phelan, 223 App. Div. 393, 228 N. Y. S. 466, aff'd 130 Misc. 590, 224 N. Y. S. 391; Gould v. Gould, 126 Misc. 54, 213 N. Y. S. 286; Monell v. Monell, 5 Johns. Ch. 283; Earle v. Earle, 48 N. Y. Super. (16 Jones & S.) 18."

In the Court of Appeals, petitioners' brief contained the following statement at pages 23-24:

"*Joseph Tumulty, who was appointed Receiver, seems to have been connected indirectly with MSO before his appointment as Receiver.* The minutes of WSO of July 5, 1923 (OB. 2), *show that he had been retained together with his associate to represent the company* before the Internal Revenue Commissioner in connection with refund of an overpayment of taxes paid by Peters Petroleum Corporation. It does not appear whether Judge Knox was aware of this situation when he appointed Mr. Tumulty one of the Receivers."

And at page 25:

"III. Findings 20 (p. 21a) and 80 (p. 30a), also court's Memo. of Op. at p. 177a, at fol. 530. It is true that Mr. Tumulty seems to have played no active part during the operations of the receivership beyond attention to tax matters, but he did participate in the formulation of the reorganization plan; he attended almost all of the meetings of the reorganization committee (R. Ex. 69); he attended all hearings before Judge Knox (R. Ex. 65, p. 1290a, fol. 3870; R. Ex. 67A, p. 1321a, fol. 3962; R. Ex. 67B, p. 1339a, fol. 4018). He was not present when the motion to confirm the report of sale was heard (R. Ex. 68A, p. 1366a). He was present on

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the application for fees and allowances (R. Ex. 68B, p. 1370a, fol. 4109) and, according to Mr. Glass, he took his responsibilities seriously and participated in all important matters of policy (ibid. fol. 4151). His services were extolled by Mr. Glass (ibid. fol. 4151). He himself spoke to show how important his services were (ibid. pp. 1404a-1409a, fols. 4211-4225). He even wrote a letter to Judge Knox amending his speech in that record (OB. 43). It was he who had suggested to Judge Knox the appointment of Mr. Glass as co-Receiver after Judge Mayer's death (fol. 4220). He certainly showed an interest and cooperated in connection with the reorganization. See his 'Dear Joe' letter to Mr. Glass (R. Ex. 77). See also OB. 44, 45, 46; R. Ex. 140a-140e. He put his confidence in Mr. Glass and had great reliance upon him, as did Judge Knox. Whether this negligence can exculpate him as a matter of law is another question which we leave to the court. Having accepted large fees for assuming the responsibility without the labor involved, it would seem clear that he cannot escape surcharge if he left all the important matters to Mr. Glass."

And at page 43:

"XIII. Finding 80 (p. 30a), that the Receiver Tumulty has been physically incapacitated since 1941 and has not been charged with any affirmative action in violation of his trust. No testimony is in the record as to the nature of Tumulty's physical incapacity, nor is there any evidence as to why he did not testify. He was represented at the trial by his son, who took no active part except for motions to dismiss, etc. Tumulty was active in the formulation of the Plan of Reorganization and on his application for fees, etc., as above set forth. He also signed the petition of May 17, 1932, for instructions on the Gulf Coast claim, which we challenge herein as fraudulent."

And again, at page 109:

"POINT XI

THE COURT ERRED IN DISCHARGING MR. TUMULTY

For these facts, see subdiv. III, p. 25, supra.

The basis upon which Mr. Tumulty was discharged is apparently that he had been physically inactive since 1941 and is not charged with any affirmative act in violation of his trust. See Memo. of Op., p. 177a, fol. 530. This was error.

No testimony was offered at the trial that Mr. Tumulty was so ill that he could not testify here. But assuming this to be true, Tumulty's liability must depend not on acts of malfeasance but on acts of non feasance.

The relationship of co-receivers is analogous to the situation of joint trustees. Samuels v. Drew, 7 F. 2d 764, aff'd 7 F. 2d 766. An executor or trustee is only responsible for his own acts and not that of his associates, but if he knows of, consents to or is negligent in failing to carry out his trust, he is liable. Re Horowitz' Will, 297 N. Y. 252, and cases therein cited at page 258. The very purpose of appointing two co-receivers is to have greater security in joint management and if one receiver takes over complete operation and management and the other stands idly by and does nothing but merely accepts his compensation, then the very purpose is frustrated.

Mr. Tumulty was not paid receivership fees for only the work which he did, but for the responsibility which he assumed and the record does not bear out any claim that he did very much. He was presumably a watchdog of the treasury and he cannot escape liability merely by saying that he did not know what was going on. It was his duty to know and for this failure he must be held accountable. He was bound to keep himself informed as to what was going on and to frustrate any effort on the part of his co-receiver to utilize receivership funds for the benefit of MSP. Brown v. Phelan, 223 App. Div. 393, 228 N. Y. S. 466, aff'd 130 Misc. 590, 224 N. Y. S. 391; Gould v. Gould, 126 Misc.

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54, 213 N. Y. S. 286; Monell v. Monell, 5 Johns. Ch. 283; Earle v. Earle, 48 N. Y. Super. (16 J. & S.) 18.

Tumulty cannot thus be lightly discharged from his obligation."

Both the prevailing and dissenting opinions in the Court of Appeals made no specific reference to Tumulty's liability, if any, having no occasion to consider the question. True it is that in the amended and supplemental objections, as pointed out by respondents at page 19 of their brief, it was suggested that Tumulty be not held accountable. This was before the trial developed the actual facts above recited. A motion to grant Tumulty his discharge was made at the trial but was resisted by petitioners and the matter was left for the determination of the court. See original record, stenographer's transcript at pages 9060-9062. Thus, respondents' counsel are in error in asserting unequivocally in their brief that petitioners had conceded that Tumulty should not be held accountable.

3.

At page 3 of the brief of respondents Glass and Tumulty, without referring to any pages of the record, they say that the receivers did not bring about the judicial sales. This apparently in direct contradiction of the original finding of the Court of Appeals in 154 F. 2d 978 (App. to Pet. 2178), a restatement of which is found in the dissenting opinion of Judge Frank at page 2065. The finding is unchallenged in the prevailing opinion. The District Court assumed this fact to be true, for Judge Smith said (124 F. 2d 728, 789):

"They" (referring to the Receivers) "went ahead and went through with the sales before there was available final and complete balance sheets based upon the resolving of litigation and intercorporate disputes. They did not, however, make it plain to the minorities who were involved, who were not made parties to the

> reorganization, or to the court, that technical flaws might exist in taking such a course or that the minorities' stocks might become valueless."

But the evidence in the record is overwhelming that they did bring about judicial sales. Not only did the receivers sit in with the reorganization committee, both tentative and definitive, at every step of negotiation which brought about the reorganization agreement (R. Ex. 63; R. Ex. 69), but they were fully aware, participated and consented to the foreclosure action instituted by the trustee under the bond indenture (pp. 427a-435a, fols. 1279-1303). What is more, they presented a written petition to the court on November 18, 1928, praying that all assets in the receivership be sold including the unpledged assets of UOP (R. Ex. 114, ja 1650-1658), upon which the final decree was made directing the sale of UOP assets subject to the foreclosure judgment (R. Ex. 115, ja 1659-1697). This sale could not have taken place until the receivers had filed a statement describing the property to be sold. See Article 6, ja 1676-7. That statement was filed December 6, 1929, ten days before the sale was held on December 16, 1929. See R. Ex. 122, ja 1700-1720, particularly at ja 1712-1715. This statement both the Court of Appeals and the District Court held was uninformative. See 154 F. 2d 978, found at pages 2166-2170; 2183-2187 of the appendix to the petition herein. The District Court held (124 F. Supp. 728, 789):

> "The formal statement filed was not only devoid of details but positively misleading in its implication of large unresolved tax claims when the receivers knew that action on the tax claims was practically complete in their favor."

Thus, the statement that the receivers did not bring about the sales or the confirmation thereof is unfounded.

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4.

At page 3 respondents say that

> "Neither receiver had any personal conflict of interest in whatever transaction petitioners may have intended to put in question. The court was fully informed of the relationships of both of them in any matter that involved a possible personal conflict."

No citation of the record is made in connection with this bald statement. The dissenting opinion specifically points to the facts in the record to the contrary. (See App. to Pet. pp. 2069-2080.) As to the retainer by the stockholders' protective committee, see pages 182a-185a. As to the fee-splitting between the firm of Olcott, Olcott & Glass and its successor for services rendered to the stockholders' protective committee, see Exhibits OB. 427-432 at pages 1811a-1815a, 1233a-1243a.

As to Glass's alleged disclosure to Judge Knox, privately with no one present, of a fee-splitting arrangement, which took place after the judicial sales were made and confirmed, see page 1236a. No disclosure was made of this arrangement upon the hearing on confirmation (see R. Ex. 68-A, pp. 1366a-1369a) although Mr. Glass attended in person (p. 1366a, fol. 4100). Nor was there any subsequent disclosure on the hearing on applications for allowances (R. Ex. 68-B, pp. 1370a-1415a) although the receiver Glass appeared in person (p. 1370a, fol. 4109) and although he personally addressed the court (pp. 1382a-1385a, fols. 4145-4153).

Hamburg was tax counsel and agreed to share his fees with the Glass law firm. So the District Court found (Finding 85 p. 31a; 124 F. Supp. 728, 736). True, the Trial Judge found that the arrangement had been brought to the court's attention, but as to when that information was furnished and under what circumstances no reference was made. The fact is, as was pointed out by Judge Frank in the minority opinion, the disclosure was made privately,

in letter form, after the confirmation of the judicial sales (App. to Pet. pp. 2073-4; see also R. Ex. 153-B p. 1427a; R. Ex. 153-C p. 1428a-1429a). The time to have made this disclosure was either at the hearing for confirmation or at the hearing on allowances above referred to; but on the application for final allowances (R. Ex. 68-B), when Mr. Hamburg presented his petition in open court, the receiver Glass remained supine and did not make the slightest suggestion that his firm was interested in Mr. Hamburg's allowances (1411a-1432a).

The receivers' other conflicts of interest between themselves as receivers of UOP and MSO were not called to the court's attention by petition for instruction and notice to anyone. The fact is that upon the hearing on final allowances it was made perfectly plain that no further court proceedings would take place on the reorganization plan and that no notice would be given to anyone (R. Ex. 68-B p. 1415a fols. 4243-5).

5.

At page 3 of the response the respondents say that the receivers did not sponsor the plan or underwrite it or make any representation concerning it. This statement is likewise unfounded. See R. Ex. 93 ja 1566-1568; OB. GGGG, printed as Exhibit 10 at S.A. p. 171; R. Ex. 22, First Report of Receivers, ja 1278 at ja 1322; R. Ex. 34, Second Report of Receivers, ja 1341 at ja 1380; R. Ex. 51, Third Report of Receivers, ja 1393 at ja 1423-5.

Judge Smith found as a fact (124 F. Supp. 728, 769):

> "245. The receivers, in a letter to Sague, chairman of the reorganization committee, circulated with the plan, stated that in their personal opinion the plan for reorganization does accomplish substantial justice to all of the interests involved, and strongly urged the prompt consummation of reorganization."

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And in his memorandum of opinion (124 F. Supp. 728, 789) he said:

> "The feeling persists that failure of the receivers more actively to seek and to inform prospective purchasers, however, in view of the receivers' assurances *to the minority interests, made the receivers and the reorganized entity insurers of the fairness of the plan as well as of the adequacy of the bids.*" (Italics ours.)

See also Judge Frank's statements (App. to Pet., pp. 2099-2100).

6.

At page 5 respondents say Glass was a junior working partner in the Olcott firm with only a small interest in it, apparently with emphasis on "small." But the record shows that when the firm was first established his interest was 12% and at the time the plan was consummated it had grown to 24% (ja 1181). How much of the fee paid to the Cunningham firm for services to the stockholders' committee came to Glass was not disclosed by him, but whether his interest in the law firm was large or small, his duty of undivided loyalty to the firm cannot be measured by such percentage, and obviously his duty to his beneficiaries cannot be measured by the amount of his compensation as receiver.

7.

At page 5 petitioners' position as bondholder is said to be small. Petitioners are the owners of OLD stock and Southern States stock, which companies were interested directly or indirectly in $389,800 of UOP bonds with accrued interest amounting to $714,503 at the time of the judicial sales. These were sold for $225,000. But even assuming that the petitioners' interest is small, this court has held that a small stockholder in a derivative suit may not be denied relief if his suit is in good faith. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 56 S. Ct. 466. The Court of Appeals held that petitioners are acting in a derivative capacity. Appendix 2200-2201, 2143-2146.

8.

At pages 7 and 8 of their brief respondents' counsel challenges the findings of Judge Frank at pages 2106-2107 in which he calls attention to the absence of adequate data in the court files in connection with the intercorporate accounts, and claims that adequate data had been filed on December 9, 1929, a week before the sale. This reference is to R. Ex. 124a to j, a summary of which appears in the opinion of the District Court, 124 F. Supp. 728, Finding 91 at 739-757.

The intercorporate accounts are not supported by any supporting data and reports of accountant experts have never been filed at any time. Indeed, at the trial we called for the production of the working papers on the basis of which these accounts were written up in the receivers' books, but were told that these had been destroyed (see 562a-575a at pp. 574a-575a; ja 394-406). Such reporting data was never filed nor were R. Ex. 75 and 76 filed, which are the receivers' tentative balance sheets and earnings statements.

At page 7 respondents say "No one having an interest in the inventory or the valuations could have failed to ascertain their existence and procure them for the asking." They refer to paragraphs 29-30 of the District Court's findings at page 732. These findings read as follows:

> "29. During 1928 there became available an appraisal by Ligon & Company of the physical properties of the oil-producing companies as of December 31, 1927.
>
> 30. This appraisal and the physical inventory on which it was based were made available to the various committees and to anyone else who expressed interest in purchasing the properties."

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We observe that the court did not find that anyone having an interest in the matter could have ascertained their existence and could have procured them for the asking. What the court did find was that these appraisals and inventories were made available to the committees and to prospective purchasers who may have asked for them. The question is: were they available to bondholders who may have asked for them? This the court did not find. They should have been, however, in the court files for anyone to see them without first applying to the receivers and establishing his right thereto.

9.

At page 11 of their brief these respondents argue that UOP was unable to pay the interest on its bonds. In our petition for rehearing in the Court of Appeals this subject was fully treated at pages 17-22. Indeed, the receivers' then counsel, Mr. Curtin, in a memorandum to the receivers found attached to R. Ex 44, which was an application by the bondholders' committee for an order instructing the receivers to assign 1000 shares of stock to it preparatory to its exercise under the trust indenture, which motion was subsequently withdrawn, made the following significant statement clearly indicating an ability to pay interest, to wit:

> "The bondholders, their committee and Trustee have stood supinely by for the past two and one-half years permitting the defaults under the trust indenture to accumulate. In the meantime, the Receivers have so conducted the affairs of the Turman Oil Company, which is the backbone of the security for the United Oil Producers bonds, that the market price of the bonds themselves has greatly increased, and the assets of Turman Oil Company multiplied many times over. It is apparent that the bondholders and their Trustee are now seeking to benefit by this situation."

10.

And at pages 7 to 10, respondents' counsel suggests that there were reorganization hearings before Judge Knox and that Judge Knox approved the plan of reorganization, and at page 16 referred to R. Ex. 157a (ja 1799-1800). There were never any hearings on reorganization such as was required by this Court in *National Surety Co.* v. *Coriell*, 289 U. S. 426. Judge Knox held conferences with the attorneys who appeared or intervened in the suit (R. Ex. 65 pp. 1290a-1320a, R. Ex. 67 A to C 1321a-1365a). No notices of hearing were ever given to any of the non-appearing stockholders or creditors. No testimony was taken. No balance sheets were ever filed. No attempt was made to determine the solvency or insolvency of the various corporations involved or to determine their priorities. No testimony was taken as to the value of assets.

The plan did not have the Judge's *judicial* approval. All the Judge did in his memorandum on the application for fees (R. Ex. 57a) was to refer to the plan in passing and stating in connection therewith that it had "no jurisdiction over the disbursements incident thereto" (ja 1799). It fell short of judicial approval. See opinion, 154 F. 2d 978, App. to Pet. pp. 2194-2195. See also R. Ex. 68-A, 1366a, at 1368a-1369a. See also Evans letter of protest showing lack of information (OB. LLL, ja 2158-2180, at ja 2168-2169).

11.

Under Point III at page 21 of their Joint Brief, respondents refer to the Judge's finding in the District Court and say that Cohen had actual notice of the sales and hearings on confirmation. What the Judge said was that notice by mail was sent to Cohen. Cohen was no party to the action. He never did appear and the notice by mail to him is of doubtful legality. See article by Judge Frank entitled "Reflections etc.", 19 Va. L. R. 561-567. Not being a party to the record, Cohen had no right of appeal.

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But assuming that he did have actual knowledge that the sales had been ordered and had taken place and that a motion to confirm the same was pending, he had a right to assume that the receivers had acted with due fidelity to their trust, had no selfish motive in bringing about the sales or the consummation thereof and that the prices paid were fair in accordance with the value of 1929 and not when he acquired his bonds. All security holders, unless they were willing to accept the terms of the plan, had a right to assume that they would be justly and fairly treated, particularly so "in view of the receivers' assurances to minority interests" which "made the receivers and the reorganized entity insurers of the fairness of the plan as well as of the adequacy of the bids" (124 F. Supp. 728, 789). Nothing that he could do then, unless he had evidence or suspicion of wrongdoing, could have affected the result. It was only upon the hearing upon objections that the full facts became plain. Clearly then, the notice or knowledge claimed is irrelevant to the questions here involved.

12.

Under Points III to VI inclusive arguments are made on the merits. We believe that these arguments have no place here but are arguments that the court might consider should the writ be granted. No reasons are given to controvert our claims that this case affects the integrity of the federal judicial process and that the court below has decided important questions of federal law which have not been and should be decided by this court and has settled federal questions in a way in conflict with the applicable decisions of this court, and has also decided an important question involving the New York State statute of limitations in a way in conflict with the applicable New York decisions. The latter proposition will be treated below in connection with our reply to the brief of the respondent MSP.

It is not disputed that the District Court and the Court of Appeals have held that the burden of proof here was upon the petitioners and not upon the respondents. Nor is it disputed that the Court of Appeals was in conflict on this question or that the applicable decisions of this court clearly point to the proposition that the burden of proof in a case such as this was upon the respondents. Both the prevailing opinion and the minority opinion in this court agree that the respondents did not sustain the burden of proof. App. Pet. pp. 2036, 2052, 2053, 2054c and 2063. The respondents did not establish affirmatively, if at all, that the reorganization committee, who acquired the assets at a judicial sale at which no upset price was designedly fixed (see Ex. OB. 41-C printed as Ex. 17, S.A. pp. 207-9, at p. 208 and OB. 41-B for id. erroneously excluded at 431a and printed at S.A. p. 202 as Ex. 11, see also 432a-434a) and at which the committee was the sole bidder, did so at prices or costs within the principles laid down by this court in *First National Bank of Cincinnati* v. *Flershem*, 290 U. S. 504 and in *National Surety Co.* v. *Coriell*, 289 U. S. 426, and the proof is overwhelming to the contrary.

The following income tax balance sheet of UOP for 1929 taken from R. Ex. 201 Sched. 34, will serve to illustrate this matter, to wit:

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ASSETS

CURRENT ASSETS:		
Special Deposits		$ 5,356.11
Accounts Receivable, Associated Companies		347.50—
Total Current Assets		5,008.61
MISCELLANEOUS ASSETS AND CLAIMS		1.00
CLAIMS RECEIVABLE, Associated Companies		
Middle States Oil Corporation	$1,371,002.93	
Imperial Oil Corporation	2,236,564.06	
Reliable Securities Corporation	786,693.50	4,394,260.49
INVESTMENT IN CAPITAL STOCK OF ASSOCIATED COMPANIES:		
Eureka Producing Company		10,000.00
TOTAL ASSETS		$4,409,270.10

LIABILITIES AND CAPITAL

LIABILITIES PAYABLE IN FULL.	
DISCOUNT ON BONDS	$ 323,551.00—
CLAIMS PAYABLE:	
Bonds, Coupons and Interest Payable	3,492,279.75
Coupons Payable, past due 8/22/24	942.97
CAPITAL STOCK AND SURPLUS:	
Capital Stock, Common	5,232,750.00
Surplus	3,993,151.62—
Total Capital Stock and Surplus	1,239,598.38
TOTAL LIABILITIES AND CAPITAL	$4,409,270.10

(— means red or negative figure)

There were no creditors other than bondholders.

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The investment in the capital stock of associated companies—Eureka Producing Company—is set down at a nominal or book value of $10,000 in the above statement. This asset, however, was represented by the receivers to the reorganization committee in their Tentative Balance Sheets as of December 31, 1927, which excluded intercorporate accounts, as being appraised by Ligon at $3,006,453.59 (see R. Ex. 76, Tent. Bal. Sheet, ja 1518). It is conceded that the corporate profits for 1928 considerably increased this figure (R. Ex. 75, ja 1462. See Turman Oil group, showing net profit of $780,000, 82.44% of which belonged to Eureka). When we substitute the figure of roughly 3 million dollars for the figure of $10,000, the assets thereupon become approximately $7,400,000. Thus, for the $4,394,260.49 of intercompany accounts, MSP, through the committee, paid only $200,010, and the Eureka stock, valued as of December 31, 1927, at $3,000,000, was acquired for $1,450,000 (see also Petition for Rehearing, par. 15, pp. 13-32).

The receivers' sole justification for the bid prices was based upon hindsight valuations reflected in R. Ex. 201 and 202, which were fabricated for the purpose of the trial and which were self-serving declarations. Even Judge Smith in the District Court gave scant consideration to the balance sheet figures (124 F. Supp. 728, Finding 176 p. 764). No effort was made by the receivers to show what could have been realized from the roughly 5 million dollars of intercorporate accounts and no evidence was introduced, and there was concededly no way of telling what they could have been worth if the receivers had attempted to collect these accounts from MSO and other subsidiaries.

The figure of $200,010 was clearly arbitrary and, obviously, the bid of $1,450,000 for the Eureka shares was somewhat less than 50% of their value as appraised at the end of 1927.

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Of course, if the receiver Glass were not actuated by personal or selfish interests in effectuating the reorganization plan and carrying through the judicial sales thereunder, much might be said in favor of the proposition that the sale to the reorganization committee for the benefit of the corporation to be organized at the prices bid, was all that could be realized at forced sale even though in violation of the principles of the *Flershem* and *Coriell* cases that the price paid must have some reasonable relation to the sale of assets of a going concern and to future income which might be reasonably anticipated.

Both Judge Smith, in the District Court, and Judge Learned Hand, in the Court of Appeals, have conceded that the receiver Glass had a personal or selfish interest in effectuating the reorganization and procuring the sale of assets under its provisions. Judge Smith's opinion seems to rest upon the idea that the selfish interests were disclosed to the Judge, indeed not before the plan was consummated or the sales confirmed but afterwards, and received absolution, whereas Judge Hand's views are predicated upon the *novel* proposition that the personal or selfish interests of the receiver were either too remote or so insubstantial as not to have influenced him to the extent of diluting his loyalty toward the beneficiaries of his trust.

All the courts below concede that Glass had an interest in the share of the fees allotted to the attorneys for the stockholders' committee. All the courts below agree that Glass had an interest in the Hamburg fee, which could not have been paid unless a "system reorganization" were effected. All the courts agree that though Glass had not accepted the presidency of the new corporation before the plan was consummated and the property sold and the sale confirmed, he did have an interest in becoming counsel to the new corporation after reorganization. All the courts agree that he did become a director and voting trustee immediately after reorganization and before officially assuming the presidency. But the majority opinion holds

that none of this was sufficient to put him to the burden of showing that no damage resulted to the beneficiaries of his trust. This, we say, is in direct conflict with the principles laid down by this court in the cases cited in the petition herein. All these cases are ignored by respondents who insist, despite the contrary rulings of the lower courts, that they have nevertheless sustained the burden of proof. We respectfully submit, therefore, that the answering brief of counsel for the representatives of the receivers is not a proper answer to the petition.

There remains the crucial question of law which, we respectfully submit, has been decided contrary to the principles laid down by this court in *Magruder* v. *Drury*, 235 U. S. 106; *Jackson* v. *Smith*, 254 U. S. 586; *Woods* v. *City National Bank & Trust Co.*, 312 U. S. 262; *Crites* v. *Prudential Insurance Co.*, 322 U. S. 408; *Mosser* v. *Darrow*, 341 U. S. 267; *Weil* v. *Neary*, 278 U. S. 160, holding that any possible conflict of interest which tends or might tend to influence a fiduciary, if undisclosed, taints the transaction in which he was engaged and throws upon him the burden to prove that no damage was sustained by the *cestui que trustant* regardless of his good faith and honesty of purpose. Moreover, the rule is or should be that where a conflict of interest arises in the case of a fiduciary representing conflicting interests as between rival trusts, he has a duty of full disclosure and can only protect himself against surcharge by resigning from one of the trusts or applying to the court for instructions upon notice to all parties interested. Corollary to this is the principle that a receiver may not participate and help to put through a reorganization plan which may be actually or constructively fraudulent, without full disclosure to interested parties and without warning of the pitfalls which may be found therein, and that such a fiduciary may not so construe a reorganization plan on becoming an officer, director or agent of the transferee or reorganized corporation as to favor his own company as against the beneficiaries of his trust as receiver. A federal court should not tolerate

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any such conduct by its receiver and should require those who have profited by the fraud to indemnify the persons wronged whenever that wrong is called to the attention of the court under whose mandate the receiver acted.

Petitioners' Reply to Brief of Respondent Middle States Petroleum Corporation

There is more to the petitioners' claim that the transfer to MSP through the reorganization committee was a mere constructively fraudulent transfer. As pointed out in the petition, the transfer was accompanied by concealment of information, which was tantamount to an affirmative misrepresentation of fact, reliance upon which and damage in such cases being presumed.

Scienter was obviously present since both the receivers and the transferee knew the facts and made no prompt or full disclosure. Aside from this, however, the responding brief as well as the opinions of the court below overlooked the following paragraph of the opinion of Judge Smith (124 F. Supp. 728, 806):

> "Moreover, in view of the past history of the dealing by the Court with the receivership as a unit, and the continuance of such dealing by the new company, M.S.P., after sales, through M.S.P.'s active executive head, Glass, who still was to M.S.P.'s knowledge, handling the estates in receivership and acting in transactions with M.S.P. on behalf of the estates in a dual capacity, it is doubtful if any single transaction by M.S.P. with any of the receiverships should be considered as complete for the purpose of laches or limitations until the final balancing of M.S.P.'s accounts with all the estates in receivership in which any outside interest, direct or indirect, continued to exist."

When MSP took over the assets it merged its offices with that of the receivers (213a-214a, fols. 637-640). It opened no bank account, but conducted its financial operations

through the receivers' special account until 1937 (see 720a-721a, 959a-1123a). Before an accounting and discharge of the original receivers, it became *de facto* receiver. Cf. 75 C. J. S. § 83, p. 730, citing *Crawford* v. *Gordon*, 88 Wash. 553 153 P. 563, L.R.A. 1916C 516.

Receivers may not plead limitations as a defense. *Ludington* v. *Thompson*, 153 N. Y. 499, quoted with approval in *Manufacturers Trust Co.* v. *Kelby*, 125 F. 2d 650, 654, opinion by Learned Hand, J. Cf. *Mattingly* v. *Boyd*, 20 How. (U. S.) 128.

Counsel for MSP argues that the issuance of the writ is not in the public interest, citing the opinion in the Court of Appeals, but the Joint Brief of the co-respondents points out, at page 6 subdivision 5, that there are "approximately 60,000 creditors and stockholders of all the receivership companies." The judicial sale not only involved the assets of UOP but those of OLD, SSO and, through intercorporate claims which were reduced to distributive values, every holding and operating company, either in or out of receivership, in the large number of companies owned or controlled by MSO in which, in many cases, there were substantial minority interests (OB 106 cf. 543a; 1170a-1171a; 1219a). All of these may be directly or indirectly adversely affected if MSP can escape liability here upon the statute of limitations plea, since the receivers have not yet accounted or been discharged of their trusts in connection with the receiverships of these corporations.

CONCLUSION

We respectfully submit that the petition for the writ be granted.

Respectfully submitted,

MEYER KRAUSHAAR,
Counsel for Petitioners.

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